

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
PETITION FOR
REHEARING**

[CORRECTED COPY]

77-1319

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1319

UNITED STATES OF AMERICA,

Appellee,

—v.—

NANCY REED,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**PETITION OF THE UNITED STATES OF AMERICA
FOR REHEARING AND SUGGESTION OF
REHEARING EN BANC**

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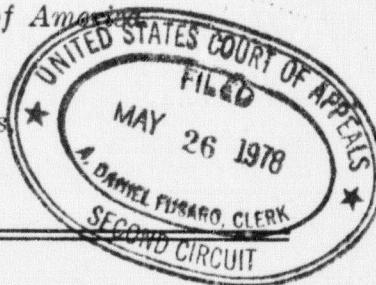


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Preliminary Statement

The United States of America respectfully petitions for rehearing, and suggests rehearing *en banc*, of that part of the opinion of a panel of this Court (Feinberg and Meskill, C.JJ; Bartels, D.J.), filed on April 11, 1978, reversing a judgment of conviction entered in the United States District Court for the Southern District of New York and directing a new trial for the defendant-appellant Nancy Reed, on the ground that certain evidence was erroneously admitted at trial. *United States v. Reed*, Dkt. No. 77-1319, slip op. 2395 (2d Cir., April 11, 1978).

Statement of the Case

Defendant Nancy Reed, together with co-defendant Morris Goldsmith, a/k/a "Marlowe," * were convicted after a jury trial before the late Honorable Frederick

* The panel affirmed the conviction of Goldsmith.

van Pelt Bryan, United States District Judge, on two counts of violating the federal narcotics laws. During the course of the trial, the District Court considered and rejected a claim by Reed that evidence seized at the time of her arrest should be suppressed because her arrest, at the door of her apartment when she responded to knocking and an announcement of identity by Drug Enforcement Administration agents, was violative of the Fourth Amendment.

The facts underlying the District Court's decision were simple. During the course of an undercover narcotics operation, agents of the Drug Enforcement Administration had conversations with Reed in which she discussed her ability to sell heroin. As a result of these conversations, on one occasion Reed produced a sample of the drug. Some weeks later, the agents knocked on the door of Reed's apartment at 7:45 A.M., announcing themselves to be agents of the United States Government. When Reed opened the door, dressed in a negligee, she was—in the words of the District Court—"arrested in full view when she opened the door." Slip op. at 2399. Immediately thereafter, the agents arrested co-defendant Goldsmith in the apartment, and also found in plain view certain telephone and address books that were ultimately admitted against Reed at trial.* Slip op. at 2401.

On appeal, a panel of this Court reversed Reed's conviction. Acknowledging that the decision it was about to make was "important and oft-reserved," slip op. at 2396, the panel held in the broadest possible terms that

* The issue on which we seek rehearing is clearly limited to the legality of the arrest of Reed. The panel does not question the propriety of the agents' being in the apartment if the arrest at the doorway had been valid, nor does the panel's opinion appear to discredit the conclusion of the District Court that the address books were properly seized in plain view. *United States v. Montiel*, 526 F.2d 1008, 1010 (2d Cir. 1975); *United States v. DiStefano*, 555 F.2d 1094, 1101 (2d Cir. 1977).

"warrantless felony arrests by federal agents effected in the suspect's home, in the absence of exigent circumstances, even when based upon statutory authority and probable cause, are unconstitutional." Slip op. at 2404. Dismissing innumerable decisions of this Court on the ground that "the precise issue presented by this case has been avoided, reserved or referred to in dictum, or has been considered in circumstances involving consent or exigent circumstances, or has not been raised by the parties," slip op. 2409 n.7, the panel chose to "follow the lead" of *United States v. Jarvis*, 560 F.2d 494 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3585 (Mar. 20, 1978) and proceeded to decide the issue presented on the broadest constitutional grounds.

Reasons for this Petition

The panel's decision in this case should be reheard, preferably by the Court *en banc*, for three principal reasons.

First, the panel has reached out to decide in sweeping constitutional terms an issue of enormous constitutional magnitude and severe practical consequences. In taking this course, the panel's opinion fails to give a fair and reasoned consideration to the arguments we advanced in our initial brief; indeed, the panel's opinion is at odds with the repeated statements made by this Court and the Supreme Court that arrest warrants are not needed for daytime arrests in a dwelling.

Second, and more particularly, the panel simply overlooks—or erroneously brushes aside as "dictum"—a prior decision of this Court upholding a warrantless arrest on facts almost exactly paralleling the facts presented in this case. Particularly in such circumstances, it ill serves the law in this Circuit to have an issue of such constitutional dimension decided as a question of first impression in the broadest terms by a single panel of this Court.

Finally, in a single and unexplained sentence of the opinion, the panel, perhaps inadvertently and at least ambiguously, suggests what may be construed to be a procedural requirement—to which not a single decision of this Court has even adverted—whereby arrest warrants must specifically indicate that they are to be executed in the defendant's home. If read as such a requirement, this wholly unprecedented and undeveloped prerequisite for an arrest in a dwelling—even by warrant—promises unimaginable difficulty in shaping the conduct of agents in what is clearly a common law enforcement situation.

ARGUMENT

The Panel Incorrectly Decided A Constitutional Issue Of Major Significance.

In reversing Reed's conviction, the panel's opinion found it necessary to decide an issue of constitutional law in broad and sweeping terms. While that issue is of great significance in all legal circles and vitally affects the public at large, the panel's resolution simply sweeps aside other controlling precedent that mandates affirmation of Reed's conviction on narrower constitutional grounds.

In *United States v. Santana*, 427 U.S. 38 (1976), the Supreme Court held that when a person as to whom there existed probable cause to arrest was seen at a spot, variously described as the "doorway," 427 U.S. at 40 and the "threshold," *id.* at 42, of her house, she was in a "public place" within the meaning of the Court's prior decision in *United States v. Watson*, 423 U.S. 411 (1976). It followed not only that the arresting agents were constitutionally permitted to arrest her without a warrant, but could pursue her into the house when she ran away from them. The Court acknowledged that the decision posed possible problems of definition, but indicated that the

governing test was not one of physical location but of assessing one's expectation of privacy:

While it may not be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment, Santana was in a "public" place. She was not in an area where she had any expectation of privacy. "What a person knowingly exposes to the public, *even in his own house or office*, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1957). She was not merely visible to the public but as exposed to public view, speech, hearing and touch as if she had been standing completely outside her house. *Hester v. United States*, 265 U.S. 57, 59 (1924). Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in *Watson*.

427 U.S. at 42 (emphasis added). As applied to this case, the critical question is simple: when Reed opened the door in response to the agent's knock, did she do so in the "expectation" that notwithstanding her decision to open the door her privacy would nonetheless remain wholly protected, or did she "expose" herself to the police? As a matter of common sense and practical experience, the latter is clearly the case. The decision of the agents to knock on the door to determine whether Reed was within was surely unobjectionable procedure. Not only was it wholly unobtrusive—compared, for example, with the "sub-arrest detentions" found permissible under the Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968) on factual showings far short of probable cause—but it was forthright and polite. When Reed willingly

responded to the knock, she clearly knew that the police would see her in the doorway and, indeed, that she would be separated from them by at most two feet of air. To hold that the arrest of one sitting in the doorway apparently not knowing the police would be there was permissible in *Santana*, but that the arrest of one who opens the door knowing the police to be present is impermissible here gives controlling influence to technical questions of property law rather than to underlying Fourth Amendment interests.* Particularly when this Court has stated on several occasions in the clearest fashion that no arrest warrant "is required for a daytime arrest, even in a dwelling, which has been made on probable cause, especially when, as here, no force was used," *United States v. Fernandez*, 480 F.2d 736, 740 n.20 (2d Cir. 1973); *United States v. Hall*, 348 F.2d 837, 841-42 (2d Cir. 1965); see also *United States v. DiStefano*,

* The panel, in noting that the Government did not argue that Reed gave her consent to enter the apartment, observes that such a consent argument would present occupants with "an unfair dilemma" since they would either have to "forfeit cherished privacy interests or refuse to open the door and thereby run the risk of creating the appearance of an 'exigency' sufficient to justify a forcible entry." Slip op. at 2414-15, n.9. This reasoning, while perhaps responsive to a claim of consent, which as noted we have not urged, is inapposite to the privacy interest analysis which is controlling here. Indeed, the panel's logic is not only essentially circular, but would in many situations give controlling weight to the decision of the occupant to open the door. For example, if, as the panel suggests, a decision not to respond to a knock would "run the risk of creating the appearance of an 'exigency' sufficient to justify a forcible entry," *id.*, the panel has created the anomalous precedent that an apartment dweller increases his "expectation of privacy" by willingly opening the door in response to a police request—that is, he achieves greater Fourth Amendment protection if he opens his door than if he left it closed. If, on the other hand, the occupant does not open the door, the agents would then face the entirely separate question of whether they should make a *forcible* entry—an issue that, as this Court has noted, is entirely separate from principles governing non-forcible entries such as the one in this case. See *United States v. DiStefano*, 555 F.2d 1094, 1100 n. 5 (2d Cir. 1977).

555 F.2d 1094, 1100 n.5 (2d Cir. 1977); *United States v. Price*, 345 F.2d 256 (2d Cir.), *cert. denied*, 382 U.S. 949 (1965), this Court's distinction of *Santana* is especially inappropriate.

Furthermore, even if the panel were technically correct in dismissing the cohesive and considered language in *Fernandez* and its numerous precedents as "dictum,"* the same simply cannot be said of the Court's decision in *United States v. Mejias*, 552 F.2d 435, 443-45 (2d Cir. 1977), *aff'g*, *United States v. Mejias*, 417 F. Supp. 598 (S.D.N.Y. 1976). In *Mejias* the facts were, if anything, more troublesome than those in this case.** After overhearing wiretapped conversations involving the defendant Mejias for a period of more than six months, the police had—for a period of at least several days prior to the arrest—probable cause to conclude that Mejias was trafficking in narcotics. On September 3, 1974, shortly before 5:00 P.M., agents saw Mejias enter an apartment building and learned that he went to his own apartment. Without a warrant, they knocked on Mejias' door. Unlike this case, however, the agents did not identify themselves when they knocked. In further distinction from this case, Mejias did not fully open the door; rather, "[t]he door was opened to the width of a chain secured on the inside" 417 F. Supp. at 601. The agents then for the first time identified themselves; when Mejias retreated into the apartment behind the locked door, the agents broke the door, entered the apartment, and arrested him.

On appeal, Mejias and two co-defendants raised the precise claim decided in this case—that is, they argued strenuously that the arrest was unconstitutional since it was based upon neither a warrant nor exigent circum-

* While space limitation precludes extensive analysis, we submit that in *Fernandez*, *Hall*, *Price*, and other decisions, the Court's clear language was not dictum but was necessary to the result.

** The facts underlying the arrest in *Mejias* are set out in considerable detail in the District Court opinion, 417 F. Supp. at 600-03.

stances. Noting that "[i]t was lawful for the state officers to force entry into Mejias' apartment to arrest him," 552 F.2d at 444, this Court rejected the claim.

The *Mejias* decision absolutely controls this case. Indeed, the only significant factual elements differing from this case—the failure of the agents to identify themselves; the partial opening of the closed door by the occupant; and the use of force—made the *Mejias* decision considerably more difficult than this one. Furthermore, the *Reed* panel offered absolutely no ground for distinguishing *Mejias*. The sole mention of *Mejias* in the opinion is inclusion of its citation in a lengthy footnote listing cases where, according to the panel, "the precise issue presented by this case has been avoided, reserved or referred to in dictum, or has been considered in circumstances involving consent or exigent circumstances." Slip op. at 2409, n.7. Even a cursory comparison of the two opinions, however, reveals that this was not so. The *Mejias* opinion did not avoid, reserve or refer in dictum to the arrest issue. Indeed, the issue was squarely raised before it, and the panel emphatically upheld the legality of the arrest. There were clearly no "circumstances involving consent or exigent circumstances"; in fact, the Government did not even assert either consent or exigent circumstances in its brief, relying solely upon the precedent of *Watson* and *Santana*. See Government's Brief at 56-59. Finally, the precise issue the panel chooses to resolve in this case was completely "raised by the parties" in *Mejias*; indeed the briefs of the defendants Padilla, pp. 23-29, and *Mejias* and Salazar-Cadena, pp. 40-48, pursued precisely the same arguments, relying upon almost exactly the same precedent, as did the appellant *Reed* in this case. See also Petition for Rehearing of Padilla, at 23-29. In short, *Mejias* is binding precedent.

* * * * *

As the panel recognized, the issue ultimately decided in this case is one of considerable importance in law enforcement practice. Significantly, two other panels in the last year have emphasized that they would not

unnecessarily decide the constitutionality of warrantless arrests in dwellings. *United States v. Berenguer*, 562 F.2d 206, 210 & n.5 (2d Cir. 1977); *United States v. Jarvis*, 560 F.2d 494 (2d Cir. 1977), *cert. denied*, 46 U.S.L.W. 3585 (March 20, 1978). We submit that this panel erred in attempting to resolve this major issue when, first, the panel had to disregard careful language in numerous precedents and when, second, the facts of this case were clearly governed by the teachings of *Santana* and *Mejias*. Particularly given the grave importance of the decision, and the minimal nature of the actual prophylactic relief that the panel's decision will afford,* we urge the panel to reconsider its

* As we pointed out in our original brief, the issuance of an arrest warrant under Rule 4 of the Federal Rules of Criminal Procedure does not even address, let alone provide a procedural mechanism for preserving, the "sanctity of the home," upon a concern for which the panel opinion is based. All that a Rule 4 warrant establishes is that there is probable cause that a person committed a crime—a determination that was not even contested by the defendant in this case, is judicially reviewable in any event, and which has absolutely no bearing whatsoever on the reasonableness of the knock on the door or the "entry" into the apartment. Unlike a warrant issued under F.R. Cr. P. 41, a Rule 4 warrant does not describe the place where the defendant is to be arrested, nor is the magistrate called upon to review the reasonableness of an "entry."

In a single sentence of the opinion, the panel obliquely remarks that the police must procure "a warrant to arrest a suspect at home" Slip op. at 2417 (footnote omitted). To the extent that this offhand remark was intended to provide an additional procedural requirement that arrest warrants include a designation of where the defendant is to be arrested, we submit that the language is particularly ill-considered. Neither the Federal Rules of Criminal Procedure nor any decision of this or any other Court provides a need for such a requirement, a procedure for such a determination, nor guidance on how the determination is to be made. Particularly since it is almost impossible to predict the factual circumstance in which an arrest will occur, the Court has—wholly without discussion—employed language which, if literally construed, will burden the police

[Footnote continued on following page]

decision; alternatively, we suggest that the Court, *en banc*, should hear the matter.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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and the magistrates with devising entirely new standards and procedures to meet the possible meanings of the sentence. Such a major change in policy and procedure should be left to the rule-making function of the Supreme Court rather than to off-hand dictum. Indeed, the support upon which the panel purports to rely in footnote 10 simply reveals the confusion that the language will engender. At the cited portions of *Dorman v. United States*, 435 F.2d 385, 396 n.25 (D.C. Cir. 1970) (*en banc*), the majority opinion of the District of Columbia Circuit noted that "it seems to be accepted . . . that the obtaining of an arrest warrant is material in supporting a search of premises as not 'unreasonable' even though the magistrate has not passed upon the need for invasion of privacy of the premises." It then goes on to observe that such a determination by the magistrate would be "helpful." 435 F.2d at 396 n.25. In 8 Moore's Federal Practice ¶ 4.04[4], at 4.29 & n.33 (2d ed. 1977), the commentator merely quotes the *Dorman* footnote and discusses issues that will raise when there is a forcible entry into a dwelling. Most mystifying of all is the panel's reference to Justice Stevens' concurring opinion in *United States v. Santana*, *supra*, 427 U.S. at 44, which does not even mention the issue.

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Frederick T. Davis being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the 26th day of May, 1978
he served ~~a copy~~ ^{two copies} of the within petition for rehearing (corrected copy)
by placing the same in a properly postpaid franked
envelope addressed:

Richard A. Greenberg, Esq.
509 Madison Avenue
New York, New York 10022

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

2-T.D.

Sworn to before me this

Frederick T. Davis

26th **day of** May, 1978

Maria D. Isaacian
MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978 80

